Supreme Court, U.S.
FILED

No. 04-1507 MAY 9 - 2005

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 2004

JUDITH MILLER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the First Amendment provide any protection for journalists subpoenaed to reveal the identity of confidential sources in federal criminal proceedings?

2. Should a federal common law privilege be recognized under Federal Rule of Evidence 501 to provide any protection for journalists who are subpoenaed in federal criminal proceedings to reveal the identity of their confidential sources?

3. Is it consistent with the Fifth Amendment for a journalist to be adjudicated in contempt and ordered imprisoned for up to eighteen months on the basis of evidence submitted *ex parte* to the district court which the journalist and her counsel were denied the opportunity to see or rebut?

PARTIES TO THE PROCEEDING

The parties to the proceeding in *In re Grand Jury Subpoena, Judith Miller* (D.C. Cir. Case No. 04-3138) were Judith Miller and the United States of America. By order of the court of appeals, that proceeding was consolidated for briefing and argument with *In re Grand Jury Subpoena, Matthew Cooper* (D.C. Cir. Case No. 04-3139) and *In re Grand Jury Subpoena, Time Inc.* (D.C. Cir. Case No. 04-3140). The parties to those proceedings were Matthew Cooper, Time Inc. and the United States.

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	1
Proceedings Before the District Court	3
The Decision of the Court of Appeals	6
REASONS FOR GRANTING THE WRIT	7
A. Review Is Warranted To Resolve The Pervasive And Irreconcilable Conflicts Among The Lower Courts As To Whether And, If So, When The First Amendment Shields Journalists From Being Ordered To Reveal Their Confidential Sources In Federal Criminal Proceedings	11
B. Review Is Warranted To Resolve The Circuit Conflict As To Whether A Journalist's Privilege Should Be Recognized Under Federal Common Law And To Address The Proper Application Of This Court's Ruling In *Jaffee* v. *Redmond*	21

PAGE

C. Review Is Warranted To Resolve A Conflict Among The Circuits As To Whether The Due Process Clause Permits A Contemnor To Be Imprisoned On The Basis Of Secret Evidence 27

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: PAGE

Abourezk v. *Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987) 28-29

Atkins v. *Virginia*, 536 U.S. 304 (2002) 25n

Ayash v. *Dana-Farber Cancer Institute*, 822 N.E.2d 667 (Mass. 2005) 23n

Baker v. *F & F Investment*, 470 F.2d 778 (2d Cir. 1972) 14

Branzburg v. *Hayes*, 408 U.S. 665 (1972) 5, 6-7, 9-10, 9n, 12-21

Brown v. *Virginia*, 204 S.E.2d 429 (Va.), *cert. denied*, 419 U.S. 966 (1974) 20n, 24n

Carey v. *Hume*, 492 F.2d 631 (D.C. Cir. 1974) 18

Cervantes v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) 15, 15n, 18n

Clampitt v. *Thurston County*, 658 P.2d 641 (Wash. 1983) 24n

Clemente v. *Clemente*, 56 Va. Cir. 530 (2001) 24n

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PAGE

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Gonzales v. *National Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1999) 14, 14n

In re Grand Jury Proceedings (Scarce v. *United States)*, 5 F.3d 397 (9th Cir. 1993) 16, 18, 26

In re Grand Jury Proceedings (Storer Communications, Inc. v. Giovan), 810 F.2d 580 (6th Cir. 1987) 16, 17

In re Grand Jury Subpoena, No. 38664 (Miss. 1st Cir. Ct. Oct. 4, 1989) 24n

In re Grand Jury Subpoena of Williams, 766 F.Supp. 358 (W.D. Pa 1991), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992) 14, 26

Greene v. *McElroy*, 360 U.S. 474 (1959) 28

In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005) 29-30

Hawkins v. *Williams*, No. 29,054 (Miss. Cir. Ct. Hinds Co. Mar. 16, 1983) 24n

Hopewell v. *Midcontinent Broadcasting Corp.*, 538 N.W.2d 780 (S.D. 1985), *cert. denied*, 519 U.S. 817 (1996) 23n-24n

Idaho v. *Salsbury*, 924 P.2d 208 (Idaho 1996) 19n, 20, 23n

PAGE

Jaffee v. *Redmond*, 518 U.S. 1 (1996).....6, 21-26

In re John Doe Grand Jury Investigation,
574 N.E.2d 373 (Mass. 1991)..... 23n

In re Kitchen, 706 F.2d 1266 (2d Cir. 1983) 27

Kurzynski v. *Spaeth*, 538 N.W.2d 554
(Wis. Ct. App. 1995).....19n, 20n. 24n

LaRouche v. *National Broadcasting Co.*,
780 F.2d 1134 (4th Cir. 1986), *cert. denied*,
479 U.S. 818 (1986) 15, 18

Lester v. *Draper*, No. 000906048
(Utah 3d Dist. Ct. Jan. 16, 2002) 24n

In re Letellier, 578 A.2d 722 (Me. 1990)....19n, 20, 20n, 23n

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(7th Cir. 2003).....16, 18-19

Miller v. *Transamerican Press, Inc.*,
621 F.2d 721 (5th Cir. 1980)..... 14

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(Miss. 2d Cir. Ct. July 31, 1990) 24n

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954 S.W.2d 650 (Mo. Ct. App. 1997)..... 23n

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(N.H. 1982).....20, 20n, 23n

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(RWS) 2005 WL 427911 (S.D.N.Y.
Feb. 24, 2005).....10-11, 23n, 26

In re Oliver, 333 U.S. 257 (1948)..... 28

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PAGE

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In re Shain, 978 F.2d 850 (4th Cir. 1992) 15, 18

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PAGE

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United States v. *LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988) 17

United States v. *Moussaoui*, 382 F.3d 453 (4th Cir. 2004) 29

United States v. *Smith*, 135 F.3d 963 (5th Cir. 1998) 15, 18

Utah v. *Koolmo*, No. 981905396 (Utah 3d Dist. Ct. Mar. 29, 1999) 24n

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Washington v. *Rinaldo*, 673 P.2d 614 (Wash. Ct. App. 1983), *aff'd on other grounds*, 689 P.2d 392 (Wash. 1984) 24n

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PAGE

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Zurcher v. *Stanford Daily*, 436 U.S. 547 (1978) 13n

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Criminal Code

18 U.S.C. § 1826 (2000) 1

18 U.S.C. § 3231 (2000) 4n

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28 U.S.C. § 1254(1) (2000) 1

Ala. Code § 12-21-142 (Michie 1995) 23n

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Cal. Evid. Code § 1070 (West 1995) 23n

Colo. Rev. Stat. § 13-90-119 (2003) 23n

D.C. Code Ann. §§ 16-4702-4703 ..... 23n, 26n

Del. Code Ann. tit. 10, §§ 4320-26 (Michie 1999 & Supp. 2002) 23n

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PAGE

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N.M. Stat. Ann. § 38-6-7 (Michie 1998) 23n

N.Y. Civ. Rights Law § 79-h (McKinney 1992) 23n

N.C. Gen. Stat. § 8-53.11 (2003) 23n

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PAGE

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Tenn. Code Ann. § 24-1-208 (2000) 23n

Rules:

Fed. R. Crim. P.

17 ..... 1, 16

Fed. R. Evid.

501 ..... 6, 21-22, 21n, 26

1101 ..... 21n

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U.S. Const. amend. V 1, 5, 7, 27-30

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PAGE

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PAGE

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PAGE

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Other Authorities:

56 F.R.D. 183 (Proposed Rules of Evidence 501-513) 21

120 CONG. REC. H12253-54 (daily ed. Dec. 18, 1974) 22

European Convention on Human Rights 24

THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN (Leonard W. Labaree *et al.*, eds. 1964) 8n

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PAGE

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23 Wright & Graham, FEDERAL PRACTICE AND PROCEDURE § 5426 (1980 & Supp. 2004) 22

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the court of appeals is reported at 397 F.3d 964 and is reprinted in the Appendix hereto at 1a-77a. The district court's opinion denying petitioner's motion to quash the Special Counsel's subpoenas is reported at 338 F. Supp. 2d 16 and is reprinted, along with the district court's unreported order denying that motion, in the Appendix at 80a-86a. The district court's order finding petitioner in civil contempt of court is unreported and is reprinted in the Appendix at 78a-79a.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2005. Petitioner's timely petition for rehearing *en banc* was denied on April 19, 2005. *See* App. 98a-103a.[1] This petition is timely filed within 90 days of that decision. Jurisdiction is invoked under 28 U.S.C. § 1254(1) (2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First and Fifth Amendments to the United States Constitution are reproduced in the Appendix to this petition at 104a. Pertinent provisions of 18 U.S.C. § 1826 (2000), Fed. R. Evid. 501 and Fed. R. Crim. Proc. 17 are reproduced in the Appendix at 105a-107a.

STATEMENT OF THE CASE

On July 6, 2003, *The New York Times* published a controversial op-ed piece written by former Ambassador Joseph Wilson that was critical of the Bush administration's claim, prior to the commencement of hostilities in Iraq, that Iraq had sought to obtain uranium, a key ingredient in the development of nuclear weaponry, from Niger. App. 183a-187a. The claim, which had been featured in the President's State of the Union Address in

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[1] References to "App." are to the appendix to this petition.

January 2003, had prompted intense public scrutiny and debate. Ambassador Wilson asserted in his op-ed piece that he had been sent to Niger in 2002 by the CIA to investigate whether it was true that Iraq had been seeking to purchase uranium from Niger. According to Ambassador Wilson, he investigated the claim and reported on his return that there was no credible evidence that any such efforts had been made. *Id.* Ambassador Wilson asserted "that some of the intelligence related to Iraq's nuclear weapons program was twisted [by the Administration] to exaggerate the Iraqi threat." App. 183a.

Eight days later, an article authored by journalist Robert Novak was published in the *Chicago Sun Times*. App. 188a-190a. Novak asserted that "the CIA's decision" to send Wilson to Niger had been made "routinely without Director George Tenet's knowledge." App. 188a. In fact, Novak maintained, the decision to send Wilson to Niger had been prompted by his wife:

> Wilson never worked for the CIA, but his wife, Valerie Plame, is an agency operative on weapons of mass destruction. Two senior administration officials told me his wife suggested sending Wilson to Niger to investigate [the report]. The CIA says its counter-proliferation officials selected Wilson and asked his wife to contact him.

App. 189a.

In the weeks following the publication of Novak's piece, a number of other stories appeared in the press concerning Wilson's claims, the Administration's response to them and the asserted role of Wilson's wife, Valerie Plame, in the CIA's decision to send her husband to Niger. A-26.[2] In the face of mounting criticism of the Novak article and those in the Administration who had provided information about Ms. Plame's CIA associations to Mr. Novak, in the fall of 2003, the Department of Justice began an investigation to determine the identity of those responsible for disclosing Ms. Plame's identity. After the

[2] References to "A-" are to the appendix of record materials filed with the court of appeals.

Department of Justice looked into the matter for several months, Attorney General Ashcroft recused himself. App. 191a. The same day, Deputy Attorney General James Comey announced the appointment of Patrick Fitzgerald, the United States Attorney for the Northern District of Illinois, as Special Counsel. App. 192a. In doing so, Mr. Comey asserted that, as acting Attorney General, he had delegated all of the powers of the Attorney General to Mr. Fitzgerald. *Id.*

Proceedings Before the District Court

On August 12 and 14, 2004, the Special Counsel issued subpoenas to Judith Miller seeking documents and testimony in connection with the Plame investigation. App. 115a-119a.

Ms. Miller is a correspondent at *The New York Times*. She writes about national security issues, with special emphasis on terrorism, the Middle East and weapons of mass destruction. App. 108a. Ms. Miller has served as *The Times*'s Cairo bureau chief, deputy Washington bureau chief, news editor, Paris correspondent, special correspondent to the Persian Gulf crisis and Sunday Magazine special correspondent. App. 109a. She has written four books, including books on Saddam Hussein and the spread of Islamic extremism. *Id.* Ms. Miller shared a Pulitzer Prize for a January 2001 series on Osama bin Laden and Al Qaeda published in *The Times*. *Id.*

Unlike most other reporters who have been subpoenaed in connection with the Special Counsel's investigation, Ms. Miller never wrote an article about Ms. Plame or Ambassador Wilson. *Id.* Ms. Miller did, however, contemplate writing one or more articles about Ambassador Wilson and related matters and, in preparation for those potential articles, spoke in strictest confidence with one or more sources whose identity Ms. Miller agreed to keep secret. *Id.*

Concluding that she could not comply with the Special Counsel's subpoenas without revealing information that would disclose the identity of her confidential sources, Ms. Miller moved to quash the subpoenas on the grounds that the information

sought was, *inter alia*, protected by the reporter's privilege recognized under the First Amendment and federal common law.[3] In support of her motion, she submitted extensive evidence demonstrating that she would not be able to function as a journalist without the use of confidential sources and that, if forced to comply with the subpoenas, her ability, and that of other journalists, to investigate and report news would be irreparably impaired. App. 108a-114a; 165a-178a; 207a-225a. Ms. Miller also testified about the importance of confidential sources in informing the public about matters of national concern:

> Over the years, I have written or contributed to innumerable articles that have been based on information received from confidential sources at the highest levels of our government. Among them, for example, is a series of articles published in The Times during January 2001 about the threat posed by international terrorists, including Osama bin Laden and Al Qaeda, for which I shared a Pulitzer Prize. The Al Qaeda series revealed a great deal of information about a serious and looming threat which, at the time, had gone largely unnoticed by many in the American public and other mainstream media. . . .
>
> I also relied to a considerable degree on confidential information provided by senior government officials for my book, *Germs*, which was published in early September 2001. The book, which I co-wrote with two other investigative journalists, discusses the real and serious threat presented by germ warfare and provides an inside look into how germ warfare had been waged. I believe that *Germs* not only raised the public's awareness surrounding the threat of germ warfare, but also brought to public light startling revelations about the actions of the United States and foreign governments in the production, testing and handling of germ-based weapons.

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[3] The district court had jurisdiction over the matter pursuant to 18 U.S.C. § 3231.

> Without the benefit of information from confidential sources who spoke to me without fear of their identities being revealed, neither the Al Qaeda series, *Germs*, nor, for that matter the vast majority of stories I have written for *The Times*, could have ever been published.

App. 110a-111a. Ms. Miller's testimony, and similar testimony from a number of other journalists, was, to our knowledge, wholly unrebutted by the Special Counsel.

In response to Ms. Miller's motion to quash, the Special Counsel submitted extensive *ex parte* affidavits in support of his position that any privilege claimed by Ms. Miller was overcome in this case. A-458; A-459. Neither Ms. Miller nor her counsel was ever permitted to examine or rebut those submissions and objected to their being considered by the district court on due process grounds.

On September 9, 2004 the district court denied the motion to quash, grounding its ruling on its reading of this Court's decision in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). The court concluded that journalists subpoenaed by a grand jury have no protection against compelled disclosure either under the First Amendment or federal common law. App. 85a; 97a. Relying on the *ex parte* affidavits, the district court held that even if there were First Amendment or common law protections, those protections against compelled disclosure had been overcome. App. 82a-83a; 96a.

Shortly after the motions to quash were denied, Ms. Miller advised the district court, through her counsel, that she could not comply with the subpoenas consistent with her professional and ethical obligations to her confidential sources, stressing that she meant no disrespect to the court. The Special Counsel promptly moved for an order holding Ms. Miller in civil contempt. The district court granted the motions, ordering Ms. Miller "confined at a suitable place until such time as she is willing to comply with the grand jury subpoenas" for the lesser of the life of the term of the grand jury (including extensions) or eighteen months. The district court simultaneously noted that Ms. Miller

had indicated her intention promptly to pursue an appeal and specifically found that her appeal was "brought in good faith and raises substantial issues of law." App. 78a. Ms. Miller was released on bail pending resolution of her appeal and promptly appealed to the court of appeals. Her appeal was ultimately consolidated with the appeals of Matthew Cooper and Time Inc. from similar orders entered by the district court. App. 6a.

The Decision of the Court of Appeals

On February 15, 2005, the court of appeals issued its decision affirming the district court. Its lengthy ruling, comprised of four separate opinions, reflected substantial disagreement on several critical points. Judge Sentelle authored the opinion for the Court joined by Judge Henderson except as to part II(B)—the discussion of the federal common law privilege. *See* App. 38a. Judge Tatel concurred in the judgment alone. Each of the panel members also issued a separate opinion.

All three members of the panel found no First Amendment protections for appellants, but their reasoning varied. Judges Sentelle and Henderson expressed the view that the First Amendment issue was foreclosed by this Court's decision in *Branzburg*. Judge Tatel, in contrast, acknowledged that many courts of appeals had construed *Branzburg* in the manner urged by appellants, but concluded that prior D.C. Circuit precedent, although inconsistent, and *Branzburg* foreclosed him from concluding that any First Amendment privilege existed. App. 41a-42a.

On the issue of federal common law, the panel members were of three different minds. Judge Sentelle concluded that the recognition of a privilege under federal common law was foreclosed by *Branzburg*. App. 24a. Judge Tatel would have recognized a privilege under Rule 501 based upon his application of this Court's ruling in *Jaffee* v. *Redmond*, 518 U.S. 1 (1996). App. 44a. Judge Henderson declined to reach the federal common law issue, concluding that the Special Counsel had offered sufficient evidence to overcome any hurdle that a privilege could present. Her opinion noted that "both the *Branzburg* majority opinion as well as Justice Powell's separate concur-

rence hint ambiguously at the existence of some special protection for reporters stemming from their significant role in sustaining our republican form of government." App. 34a.

Eight pages were redacted from Judge Tatel's opinion. App. 66a-74a. The redacted passages, which were based on the *ex parte* submissions provided to the district court by the Special Counsel, apparently set forth the facts that led the court to conclude that the Special Counsel had overcome any privilege that might exist. App. 15a. The court also concluded that petitioner's rights under the Due Process Clause were not implicated by the fact that neither she nor her counsel had been permitted to see the omitted material upon which the court relied. App. 16a.

REASONS FOR GRANTING THE WRIT

Every day in newsrooms across this country, reporters gather information of enormous import to the public from sources who only agree to disclose that information on the condition that the reporters agree to maintain the confidentiality of their identities. As the record in this case reveals, this is particularly so in our Nation's capital. In the post-9/11 era, it has become the norm—indeed a regularly required practice—at the White House, the Department of Defense, the Department of Homeland Security and elsewhere for government officials to require promises of confidentiality before information will be made available to the press and therefore the public. App. 215a.

As this case reflects, journalists feel passionately about protecting the identity of their confidential sources, even when doing so places their own liberty at peril.[4] They do so both because they believe they should keep their word and because

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[4] In a survey of 711 journalists conducted by the First Amendment Center in cooperation with Investigative Reporters and Editors and the Radio and Television News Directors Association, over 86 percent of the respondents agreed that "the use of confidential sources [was] essential to [their] ability to report some news stories to the public." *See Reporters and Confidential News Sources Survey—2004*, at http://www.firstamendmentcenter.org/news.aspx? item=reporters_confidential_survey_04 (last visited May 4, 2005).

they know that if they do not, their sources will dry up and they will be unable to offer timely information to the public about important issues of our day. There is nothing new in this. From the pre-revolutionary days of British colonial rule when John Peter Zenger refused to reveal his sources while he was jailed for criticizing the British governor of New York and young Benjamin Franklin declined to identify the sources of his brother's Philadelphia newspaper through today, journalists have steadfastly protected the confidentiality of their sources.[5] Indeed, the ethics codes of every major national organization of journalists in this country insist that journalists do so. *See, e.g.*, American Society of Newspaper Editors Statement of Principles, Art. VI ("Pledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly."), *at* http://www.asne.org/index.cfm?ID=888 (last visited May 6, 2005); Radio-Television News Directors Ass'n Code of Ethics and Professional Conduct ("Journalists should keep all commitments to protect a confidential source."), *at* http://www.rtnda.org/ethics/coe.shtml (last visited May 6, 2005); Society of Professional Journalists Code of Ethics ("Keep promises."), *at* http://www.spj.*org*./ethics_code.asp (last visited May 6, 2005).[6]

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[5] *See* Gene Wiggins, *The Case of John Peter Zenger (1735)*, *in* THE PRESS ON TRIAL: CRIMES AND TRIALS AS MEDIA EVENTS, at 8 (Lloyd Chiasson, Jr. ed. 1997); THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN, at 69 (Leonard W. Larabee, et al., eds., 1964).

[6] The duty of journalists to protect the confidentiality of sources is recognized by professional press societies throughout the world. *See e.g.*, International Federation of Journalists, *Declaration of Principles on the Conduct of Journalists*, Art. 6 (adopted Apr. 25-28, 1954 and amended June 2-6, 1986), *at* http:/www.uta.fi/ethicnet/ifj.html (last visited May 5, 2005) ("The journalist shall observe professional secrecy regarding the source of information obtained in confidence."); United Kingdom Press Complaints Commission, *Code of Practice*, Art. 14 (ratified Apr. 28, 2004 and in effect from June 1, 2004), *at* http://www.pcc.org.uk/cop/cop.asp (last visited May 5, 2005) ("Journalists have a moral obligation to protect confidential sources of information."); Association of Journalists of the Republic of Poland, *Code of Ethics*, Art. II (adopted Sept. 1991), *at* http://www.uta.fi/ethicnet/poland.html (last visited May

The situation faced by Ms. Miller is not unique and is likely to recur. In the last 15 months, it has been reported that more than 70 journalists and news organizations have been embroiled in disputes with federal prosecutors and other litigants seeking to discover unpublished information; dozens have been asked to reveal their confidential sources; at least nine of those currently face the prospect of imminent imprisonment or substantial punitive fines.[7] Yet even as the number of reporters subpoenaed to reveal the identity of their confidential sources has continued to soar, the law governing the relationship between reporters and their sources has become ever less clear.

This Court has not considered the issue of whether journalists have any right not to reveal the identity of confidential sources since its decision in *Branzburg*, decided more than 30 years ago. That decision has been described by both courts and commentators as "confusing,"[8] "enigmatic,"[9] and filled with

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5, 2005) ("A journalist is obliged to keep and to preserve the professional secret if the informant reserves his/her anonymity."); Swiss Federation of Journalists, *Declaration of Duties and Rights of Journalists*, § 6 (adopted June 17, 1972 and partially revised Sept. 16, 1994), *at* http://www.uta.fi/ethicnet/switz. html (last visited May 5, 2005) ("[Journalists must] keep the professional secrecy and do not reveal the sources of confidential information.'); Hong Kong Journalists' Ass'n, Code of Ethics, § 7, *at* http:// www.uow.edu.au/ crearts/journalism/AJNET/ethics.html (last visited May 5, 2005) ("A journalist shall protect confidential sources of information.").

[7] *See, e.g.*, Rachel Smolkin, *Under Fire*, 27 AM. JOURNALISM REV., 18 (Feb. 1, 2005); Reporters Committee for Freedom of the Press, *Special Report: Reporters and Federal Subpoenas*, *at* http://www.rcfp.org/shields_ and_subpoenas.html (current as of Apr. 19, 2005).

[8] *See* Adam Liptak, *The Hidden Federal Shield Law: On the Justice Department's Regulations Governing Subpoenas to the Press*, 1999 ANN. SURV. AM. L. 227, 231 (1999) ("*Branzburg* is a confusing 4-1-4 decision.").

[9] *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting) (characterizing Justice Powell's concurring opinion as "enigmatic"); ROBERT D. SACK, SACK ON DEFAMATION, § 14.3.2 at 14-13 - 14-14 (3d ed. 2004) (describing Justice White's opinion as "rather enigmatic.").

"internal contradiction."[10] As one commentator has put it, "[t]he lower courts have struggled to interpret the conflicting principles of *Branzburg*, and the level of constitutional protection extended to newsgathering remains unsettled."[11] In an area of law where predictability is of paramount importance, the current state of the law is, to put it mildly, confused.

In the years since *Branzburg*, the courts of appeals have continued to wrestle with the issue of whether there is any constitutional or common law privilege at all, with the impact of Justice Powell's critical concurring opinion in that case and with the application of the privilege in varying contexts. A reporter gathering information for an article thus cannot be sure which circuit's law may be held to govern the question of whether (and, if so, to what extent) a promise to protect the identity of confidential sources will be legally honored; in at least four circuits, such protection is provided in criminal cases; in at least ten circuits, similar protection is provided in civil cases. Nor can journalists predict whether a subpoena will issue in connection with a state court proceeding (49 of the states now provide total or qualified protection for journalists) or a federal tribunal (which may, as the court of appeals determined here, provide no protection at all).

The cacophony, if not utter chaos, among the circuit courts is well illustrated by the simultaneous progress of distinct judicial proceedings involving Ms. Miller and the same federal prosecutor in two circuits. In this case, the Court of Appeals for the District of Columbia has determined that, when subpoenaed by a federal grand jury, journalists have no recourse to the First Amendment to protect the identity of their confidential sources. At the same time, a federal district court in New York, in another case involving Ms. Miller and Mr. Fitzgerald, has ruled precisely to the contrary relying on Second Circuit precedent and that of other circuits. *See New York Times Co.* v. *Gonzales*,

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[10] Jennifer L. Marmon, Note, *Intrusion and the Media: An Old Tort Learns New Tricks*, 34 IND. L. REV. 155, 158 (2000) ("*Branzburg* . . . set forth an internal contradiction").

[11] *Id.*

No. 04 Civ. 7677 (RWS), 2005 WL 427911 (S.D.N.Y. Feb. 24, 2005).

All this conflict arises about a journalistic practice that has had the most direct impact on the ability of our citizens to be informed. Throughout our country's history much significant reporting about serious national issues would have been impossible but for information provided by sources who insisted that their identities remain confidential.

Some of the articles based upon confidential sources have become the stuff of journalistic legend—reporting on the Pentagon Papers and the Watergate scandal, for example—but by far the greater use of such information is reflected in day-to-day reporting on the widest range of topics. In the three months after the attack on the United States on September 11, 2003, for example, Ms. Miller and a colleague wrote 78 articles published in *The New York Times* that "contained information from confidential sources on a range of issues including: (1) financing and support of Al Qaeda provided from sources in Pakistan, Saudi Arabia, and the United Arab Emirates; (2) cooperation between Al Qaeda and Pakistani intelligence prior to September 11, 2001; (3) the U.S. government's preparedness for the attacks of September 11, 2001; (4) the U.S. government's efforts to combat Al Qaeda in Afghanistan; (5) the proposed internal reorganization of the FBI; (6) the existence of weapons of mass destruction in Iraq; (7) the spread of anthrax and resulting U.S. government investigations." *Id.* at *9, n.7. If the court of appeals is correct that journalists no longer have any claim to protect such sources from federal prosecutors, the public would be deprived of information of the most profound importance.

A. Review Is Warranted To Resolve The Pervasive And Irreconcilable Conflicts Among The Lower Courts As To Whether And, If So, When The First Amendment Shields Journalists From Being Ordered To Reveal Their Confidential Sources In Federal Criminal Proceedings

The federal courts of appeals are deeply divided over the fundamental constitutional question presented by this case and

answered in the negative by the court below—*i.e.*, whether the First Amendment protects reporters called upon to reveal confidential sources in federal criminal proceedings, including before grand juries. These divisions, detailed below, have left the law in disarray, with reporters granted a patchwork of First Amendment protections that vary widely from circuit to circuit.

In *Branzburg*, the Court was presented with a case involving journalists who had been held in contempt for failure either to appear or testify before grand juries that were investigating criminal conduct that the reporters had learned about in the course of preparing stories for publication. The Court upheld the contempt convictions in a 5-4 decision making clear, at the same time, that newsgathering is not without First Amendment protection. 408 U.S. at 681 ("[W]ithout some protection for seeking out the news, freedom of the press would be eviscerated."). Justice Powell, who joined the majority with his deciding vote, wrote a separate concurring opinion that was plainly crafted to set forth the limited scope of the Court's ruling—or, at the least, the limited nature of any opinion Justice Powell was prepared to join. In so doing, Justice Powell observed that the ruling did not mean that "newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources." *Branzburg*, 408 U.S. at 709 (Powell, J., concurring). In clarifying the nature of these "constitutional rights," Justice Powell explained, in an oft-quoted passage, that:

> [I]f the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. *The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.* The balance of these vital con-

> stitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Id. at 710 (emphasis added).[12]

In the decades since *Branzburg* was decided, considerable disagreement and resultant uncertainty has emerged among and within the circuit courts as to whether and to what extent the First Amendment provides any protection to reporters and their confidential sources. Four circuits recognize First Amendment protection stemming from *Branzburg* in civil and criminal cases. Three circuits recognize such protection in civil but not criminal cases. Two circuits recognize protections in civil cases but have not addressed what, if any, protections are available in the criminal context. One circuit has rejected protection in the criminal context but has not considered whether protections are available in the civil context. One circuit recognizes the privilege in civil cases and criminal trials but has refused to recognize the privilege in grand jury proceedings. Another circuit has rejected the privilege entirely.

The First, Second, Third and Eleventh circuits have recognized First Amendment protection resulting from *Branzburg* in both civil and criminal cases. These, of course, are the courts of appeals whose decisions conflict most directly and irreconcilably with the decision below. In *United States* v. *Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981), for example, the Third Circuit held that "journalists possess a qualified privilege not to divulge confidential sources and not to disclose unpublished information in their possession in criminal cases." The court concluded that "the interests of the press that form the foundation of the privilege are not diminished because the nature of the underlying proceeding out

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[12] In his later concurring opinion in *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 570 (1978), Justice Powell observed that his *Branzburg* concurrence had made clear that "[i]n considering a motion to quash a subpoena directed to a newsman, the court should balance the competing values of a free press and the societal interest in detecting and prosecuting crime." *Id.* at 570 n.3 (Powell, J., concurring).

of which the request for the information arises is a criminal trial." *Id. See also In re Grand Jury Subpoena of Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992) (*en banc*) (grand jury investigation); *Riley* v. *City of Chester*, 612 F.2d 708, 714-15 (3d Cir. 1979) (civil case).

The First, Second and Eleventh Circuits are in accord with the Third. *See In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004) (collecting cases);[13] *United States* v. *Burke*, 700 F.2d 70, 77 (2d Cir. 1983) (citing *Baker* v. *F & F Investment*, 470 F.2d 778, 784 (2d Cir. 1972); *Gonzales* v. *National Broadcasting Co.*, 194 F.3d 29, 36 (2d Cir. 1999);[14] *United States* v. *Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (applying *Miller* v. *Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980)), *cert. denied*, 483 U.S. 1021 (1987).[15]

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[13] In *In re Special Proceedings*, which involved the criminal contempt conviction of Rhode Island television reporter James Taricani, the court observed that it has traditionally required " 'heightened sensitivity' to First Amendment concerns and invite[d] a 'balancing' of considerations" when reporters are subpoenaed in civil and criminal cases. 373 F.3d at 45. Demonstrating the uncertainty surrounding *Branzburg*'s application, however, the court qualified its holding by noting that its previous decisions arose "at least in situations distinct from *Branzburg*" and that it is "unsettled" whether the protections it identified were strictly constitutional requirements or simply "prudential considerations." *Id.*

[14] The Second Circuit, which has concluded that "*Branzburg* recognized the need to balance First Amendment values even where a reporter is asked to testify before a grand jury," found "no legally-principled reason" for distinguishing between civil and criminal cases when applying the privilege, *see Burke*, 700 F.2d at 77, but indicated that in criminal cases the threshold to overcome the privilege may be "lower." *See Gonzales*, 194 F.3d at 34 n.3.

[15] Courts that have agreed on the existence of a First Amendment privilege in criminal cases have not always agreed on the scope of that privilege and the proper threshold for overcoming it. *See generally* Karl H. Schmid, *Journalist's Privilege in Criminal Proceedings: An Analysis of United States Courts of Appeals' Decisions from 1973 to 1999*, 39 AM. CRIM. L. REV. 1441 (2002) (concluding that courts of appeals have

In contrast to these four circuits, three other circuits (the Fourth, Fifth, and now, the District of Columbia Circuit) have held that *Branzburg* forecloses First Amendment protection for reporters in criminal cases, but not in civil cases. In *United States* v. *Smith*, 135 F.3d 963, 968-72 (5th Cir. 1998), the Fifth Circuit held that, at least with respect to non-confidential information, "the needs of the press are not to be weighed against the needs of the government" in criminal, as opposed to civil, proceedings. The court in *Smith* was aware of the obvious conflict its decision created with other circuits. *Id.* at 969 ("Some courts have taken from Justice Powell's concurrence a mandate to construct a broad, qualified newsreporters' privilege in criminal cases . . . we decline to do so.") (citations omitted). *Compare id. with Miller*, 621 F.2d at 726 (recognizing privilege in civil case). The Fourth Circuit took a similar position in *In re Shain*, 978 F.2d 850, 852 (4th Cir. 1992), which also involved a subpoena for non-confidential information, finding that "absent evidence of government harassment or bad faith, the reporters have no privilege different from that of any other citizen not to testify about knowledge relevant to a criminal prosecution." *Compare id. with LaRouche* v. *National Broadcasting Co.*, 780 F.2d 1134 (4th Cir.) (recognizing privilege in a civil case), *cert. denied,* 479 U.S. 818 (1986). The District of Columbia Circuit now similarly recognizes a First Amendment privilege against compelled disclosure in civil, but not criminal cases. *Compare* App. 14a *with Zerilli* v. *Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981).

The other circuits have adopted varying positions. The Eighth and Tenth Circuits have recognized a privilege in civil cases but have not directly addressed whether any First Amendment protection is available in criminal cases. *See Cervantes* v. *Time, Inc.*, 464 F.2d 986, 992 n.9 (8th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973);[16] *Silkwood* v. *Kerr-McGee Corp.*, 563 F.2d

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applied varying standards for overcoming the privilege but have generally been more lenient in approving prosecutors' subpoenas than those served by defendants in criminal cases).

[16] In *Cervantes*, the Eighth Circuit distinguished *Branzburg* on the basis that it involved criminal proceedings. 464 F.2d at 992 n.9.

433, 437 (10th Cir. 1977). The Sixth Circuit, on the other hand, has rejected the privilege in a criminal case but has not yet addressed whether a privilege exists in civil cases. *See In re Grand Jury Proceedings (Storer Communications, Inc. v. Giovan)*, 810 F.2d 580, 584 (6th Cir. 1987).

The Ninth Circuit has adopted a unique position: it has upheld the privilege in civil cases and in criminal trials, but has rejected the privilege in the context of grand jury proceedings. *Compare Shoen* v. *Shoen*, 5 F.3d 1289 (9th Cir. 1993) (recognizing privilege in civil case) *with Farr* v. *Pitchess*, 522 F.2d 464 (9th Cir. 1975) (upholding privilege in criminal trial), *cert. denied*, 427 U.S. 912 (1976), *and In re Grand Jury Proceedings (Scarce* v. *United States)*, 5 F.3d 397 (rejecting privilege in grand jury context). Although the court in *In re Grand Jury Proceedings* did not articulate a legally principled distinction between criminal trials and grand jury investigations for purposes of applying the First Amendment, it appears that the First Amendment rights of journalists in the Ninth Circuit depend entirely on this distinction, which stems from the Ninth Circuit's unique reading of *Branzburg*.

The Seventh Circuit, by contrast, has concluded that *Branzburg* forecloses the recognition of First Amendment protection for reporters. In *McKevitt* v. *Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003), a civil case, the court held that *Branzburg* only requires that subpoenas directed to reporters, like all subpoenas, be "reasonable in the circumstances," as required by Fed. R. Crim. Proc. 17. Writing for the court, Judge Posner acknowledged the split in the circuit courts, observing that "[a] large number of cases" have identified a reporter's privilege based on *Branzburg* but "do not agree on its scope." *Id.* at 532.

The disagreements between the circuit courts over the reporter's privilege stem in large part from a disagreement as to the meaning and effect of Justice Powell's concurrence in *Branzburg*. Given the "enigmatic" nature of the *Branzburg* holding, this is not surprising. Perhaps Justice Stewart summarized the challenges of understanding *Branzburg* best when he stated

that, "[in *Branzburg*], the Court rejected the [reporters'] claims by a vote of five to four, or, considering Mr. Justice Powell's concurring opinion, perhaps by a vote of four and a half to four and a half." Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975), *reprinted in* 50 HASTINGS L.J. 705, 709 (1999). The courts of appeals have strained to make sense of the opinion and have reached diverging interpretations of its meaning and precedential significance.

Four circuits (the First, Second, Third and Eleventh) have consistently held that Justice Powell's concurrence was determinative of the outcome in *Branzburg*. *See United States* v. *LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988) (characterizing Justice Powell's concurring opinion as "essential"); *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 8 & n.9 (2d Cir.) (concluding that Justice Powell "cast the deciding vote" in *Branzburg* and that "his reservations are particularly important in understanding the decision"), *cert. denied,* 459 U.S. 909 (1982); *Riley*, 612 F.2d at 715-16 (applying Justice Powell's balancing test and observing that he "cast the deciding vote in *Branzburg*"); *Caporale*, 806 F.2d at 1504 (citing *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983) (finding a First Amendment privilege based on a "careful reading of the plurality and concurring opinions in *Branzburg*")).

By contrast, one circuit (the Sixth), has unequivocally held that Justice Powell's concurrence deserves no weight at all independent of the majority's opinion. *See In re Grand Jury Proceedings (Storer Communications, Inc.* v. *Giovan)*, 810 F.2d at 584-85 ("It is readily apparent, then, that Justice Powell's concurring opinion is entirely consistent with the majority opinion, and neither limits nor expands its holding[.]").

Four circuits (the Fourth, Fifth, Ninth and now the D.C. Circuit) have expressed shifting views on the effect of Justice Powell's concurrence. The decision below, for example, refused to give independent weight to Justice Powell's concurrence, *see* App. 12a-13a, thus conflicting directly with the D.C. Circuit's earlier observation that *Branzburg* was "controlled" by Justice

Powell's opinion. *See Carey* v. *Hume*, 492 F.2d 631, 636 (D.C. Cir. 1974). Similarly, in *Farr*, 522 F.2d at 467, the Ninth Circuit relied on Justice Powell's opinion (which it said was "needed to obtain a plurality") when it balanced reporters' First Amendment interests and societal interests in a dispute arising out of the criminal trial of Charles Manson. Later, however, in finding that no privilege existed in *In re Grand Jury Proceedings (Scarce* v. *United States)*, 5 F.3d at 400, the same court found that Justice Powell's concurrence merely "underscored" the majority opinion. The Fourth and Fifth Circuits have similarly expressed internally inconsistent views regarding the meaning and effect of Justice Powell's concurrence. *Compare Selcraig*, 705 F.2d at 792 (finding a qualified privilege based on the "plurality and concurring opinions" in *Branzburg*), *with Smith*, 135 F.3d at 969 (noting "plurality" characterization in *Selcraig*, but declining to take from Justice Powell's opinion "a mandate to construct a broad, qualified newsreporter's privilege in criminal cases"); *compare LaRouche* v. *National Broadcasting Co.*, 780 F.2d at 1139 (finding a broadly applicable First Amendment privilege based on Justice Powell's concurrence), *with In re Shain*, 978 F.2d at 853 (concluding that Justice Powell's concurrence only "emphasize[ed] the Court's admonishment against official harassment of the press").

The remaining circuit court decisions interpreting *Branzburg* have either not specifically addressed the meaning and import of Justice Powell's concurrence (*i.e.*, the Eighth and Tenth Circuits),[17] or have announced they are decidedly unsure of the opinion's effect:

> Although the Supreme Court in [*Branzburg*] declined to recognize such a privilege, Justice Powell, whose vote was essential to the 5-4 decision rejecting the claim of privilege, stated in a concurring opinion that such a claim should be decided on a case-by-case basis by balancing the freedom of the press against the obligation to assist in criminal proceedings. Since the dissenting Justices would

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17 *See Cervantes*, 464 F.2d at 992 n.9; *Silkwood*, 563 F.2d 433.

> have gone further than Justice Powell in recognition of the reporter's privilege, and preferred his position to that of the majority opinion (for they said that his "enigmatic concurring opinion gives some hope of a more flexible view in the future") maybe his opinion should be taken to state the view of the majority of the Justices—though this is uncertain, because Justice Powell purported to join Justice White's "majority" opinion.[18]

McKevitt, 339 F.3d at 531-32.

Granting certiorari would also afford the Court an opportunity to resolve the irreconcilable conflicts between the circuits that have concluded that there is no First Amendment privilege in criminal cases (or any case) and decisions of state courts of last resort, which, when the issue has been presented, have frequently recognized a reporter's privilege under the First Amendment in criminal and civil cases alike.[19] These conflicts,

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[18] Similar differences of opinion and shifting views regarding the effect of Justice Powell's concurrence have been widespread among state courts of last resort. *Compare In re Letellier*, 578 A.2d 722, 724 (Me. 1990) (noting that while Justice Powell's concurrence was "the critical fifth vote," he wrote only "to respond to concerns raised in the *Branzburg* dissents"), *with Idaho* v. *Salsbury*, 924 P.2d 208, 209-10 (Idaho 1996) (adopting Justice Powell's balancing approach and concluding that he "cast the deciding vote creating the majority for the decision"), *and Vermont* v. *St. Peter*, 315 A.2d 254, 255 (Vt. 1974) (concluding that Justice Powell's concurrence "suggests that the First Amendment supports enough of a privilege in newsgatherers to require a balancing between the ingredients of freedom of the press and the obligation of citizens, when called upon, to give relevant testimony relating to criminal conduct"), *and Kurzynski* v. *Spaeth*, 538 N.W.2d 554, 558 (Wis. Ct. App. 1995) ("[T]he majority opinion in *Branzburg* when read together with the concurring opinion of Justice Powell, whose agreement was necessary to achieve that majority, recognized a qualified journalist's privilege[.]").

[19] *Idaho* v. *Salsbury*, 924 P.2d 208 (Idaho 1996) (criminal); *Winegard* v. *Oxberger*, 258 N.W.2d 847 (Iowa 1977) (civil), *cert. denied*, 436 U.S. 905 (1978), *followed in Waterloo/Cedar Falls Courier* v. *Hawkeye Community College*, 646 N.W.2d 97 (Iowa 2002) (civil); *In re Pennington*, 581 P.2d 812 (Kan. 1978) (criminal), *cert. denied*, 440 U.S. 929

particularly as regards the proper interpretation of *Branzburg*, are stark. *See, e.g., New Hampshire* v. *Siel*, 444 A.2d 499, 502 (N.H. 1982) ("Our review of *Branzburg* . . . convinces us that a majority of the justices on the United States Supreme Court recognized that a reporter had a qualified first amendment privilege to protect confidential sources."); *In re Letellier*, 578 A.2d 722, 726 (Me. 1990) ("The First Amendment thus requires that we balance the competing societal and constitutional interests on a case-by-case basis, weighing any possible injury to the free flow of information against the recognized obligation of all citizens to give relevant evidence regarding criminal conduct."); *In re Pennington*, 581 P.2d 812, 815 (Kan. 1978) ("Courts applying *Branzburg* to criminal cases have generally concluded that the proper test for determining the existence of a reporter's privilege in a particular criminal case depends upon a balancing of the need of a defendant for a fair trial against the reporter's need for confidentiality."), *cert. denied*, 440 U.S. 929 (1979); *id.* ("While courts recognize that a news reporter's privilege is more tenuous in a criminal proceeding than in a civil case, that fact in and of itself does not automatically require disclosure in a criminal case."); *Idaho* v. *Salsbury*, 924 P.2d 208, 213 (Idaho 1996) (applying "a balancing test between the freedom of the press—the right of the public to have an unfettered press—and the right of the public to disclosure in the particular proceeding" in a criminal trial based on its reading of *Branzburg*).

The scope—indeed, the existence—of a reporter's privilege is a matter of the highest importance as to which there is ongoing and irreconcilable disagreement in the lower courts that is well worthy of plenary review by this Court.

(1979); *In re Letellier*, 578 A.2d 722 (Me. 1990) (criminal); *New Hampshire* v. *Siel*, 444 A.2d 499 (N.H. 1982) (criminal); *Vermont* v. *St. Peter*, 315 A.2d 254 (Vt. 1974) (criminal); *Brown* v. *Virginia*, 204 S.E.2d 429 (Va.) (criminal), *cert. denied*, 419 U.S. 966 (1974); *West Virginia ex rel. Hudok* v. *Henry*, 389 S.E.2d 188 (W. Va. 1989), *followed and modified in West Virginia ex rel. Charleston Mail Ass'n* v. *Ranson*, 488 S.E.2d 5 (W. Va. 1997) (criminal); *Wisconsin* v. *Knops*, 183 N.W.2d 93 (Wis. 1971) (criminal), *followed in Kurzynski* v. *Spaeth*, 538 N.W.2d 554 (Wis. Ct. App. 1995) (civil).

B. Review Is Warranted To Resolve The Circuit Conflict As To Whether A Journalist's Privilege Should Be Recognized Under Federal Common Law And To Address The Proper Application Of This Court's Ruling In *Jaffee* v. *Redmond*

The issue of whether a reporter's privilege should be recognized under federal common law is worthy of the exercise of this Court's certiorari jurisdiction because the court of appeals' decision cannot be reconciled with this Court's ruling in *Jaffee* and because the decision below conflicts with definitive rulings of the United States Court of Appeals for the Third Circuit.

In 1975, three years after *Branzburg* was decided, Congress enacted the Federal Rules of Evidence, which, rather than enumerate a number of specific federal privileges, provided that privileges in federal civil and criminal cases "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501.[20] Originally, the proposed Rules of Evidence defined nine specific testimonial privileges and indicated that, absent constitutional mandate, Act of Congress, or revision of the Rules, no other privileges would be recognized. *See* 56 F.R.D. 183, 230-61 (1972) (Proposed Rules 501-513). Congress rejected the rigid framework of the original proposal in favor of Rule 501's flexible mandate. *See Jaffee*, 518 U.S. at 8 n.7; *Trammel* v. *United States*, 445 U.S. 40, 47 (1980).

In interpreting Rule 501, this Court has repeatedly noted Congress' intent to keep the federal law of privilege fluid. "In rejecting the proposed Rules and enacting Rule 501," the Court has held, "Congress manifested an affirmative intention not to freeze the law of privilege," but rather to "leave the door open to change," *id.*, and to " 'continue the evolutionary development of testimonial privileges.' " *Jaffee*, 518 U.S. at 9 (quoting *Trammel*, 445 U.S. at 47).

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[20] Federal Rule of Evidence 1101 makes clear that Rule 501 applies to grand jury proceedings.

The legislative history makes clear that, in approving this flexible approach, Congress expected the federal courts to determine whether a reporter's privilege exists under federal common law. As Congressman Hungate, Chairman of the House Judiciary Subcommittee on Criminal Justice, stated when presenting the Conference Report to the House, Rule 501 "permits the courts to develop a privilege for newspaperpeople on a case-by-case basis." 120 CONG. REC. H12253-54 (daily ed. Dec. 18, 1974). *See also* 23 Wright & Graham, FEDERAL PRACTICE AND PROCEDURE § 5426 (1980 & Supp. 2004) ("The legislative history suggests that Congress expected that Rule 501 would be used to create a privilege for newsmen.").

In *Jaffee*, the Court recognized a psychotherapist/patient and social worker/client privilege under Rule 501, noting that protecting such communications serves important private and public interests. 518 U.S. at 11. The same is true here. As the Third Circuit observed in recognizing a reporter's privilege under Rule 501:

> The interrelationship between newsgathering, news dissemination and the need for a journalist to protect his or her source is too apparent to require belaboring. A journalist's inability to protect the confidentiality of sources s/he must use will jeopardize the journalist's ability to obtain information on a confidential basis. This in turn will seriously erode the essential role played by the press in the dissemination of information to the public.

Riley, 612 F.2d at 714 (citations omitted).

Like the privilege recognized in *Jaffee*, the important interests served by the reporter's privilege also outweigh the likely evidentiary costs because, as Judge Tatel observed, without a privilege, sources will be far less likely to make statements to the press that prosecutors and/or litigants will be interested in discovering. App. 47a.

In *Jaffee* this Court recognized a privilege under Rule 501 in good part because "all 50 States and the District of Columbia

have enacted into law some form of psychotherapist privilege." 518 U.S. at 12. A similar state-by-state consensus exists now regarding the reporter's privilege. Today, 31 states (plus the District of Columbia) have "shield laws."[21] Of the 19 states without statutory shield laws, courts in all but one (Wyoming—which has remained silent on the issue) have recognized a reporter's privilege in one context or another.[22] In fact, the pro-

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[21] *See* Ala. Code § 12-21-142; Alaska Stat. §§ 09.25.300-.390; Ariz. Rev. Stat. §§ 12-2214, 12-2237; Ark. Code Ann. § 16-85-510; Cal. Evid. Code § 1070; Colo. Rev. Stat. § 13-90-119; D.C. Code Ann. §§ 16-4702, 4703; Del. Code Ann. tit. 10, §§ 4320-26; Fla. Stat. Ann. § 90.5015; Ga. Code Ann. § 24-9-30; 735 Ill. Comp. Stat. Ann. 5/8-901 to 8-909; Ind. Code Ann. §§ 34-46-4-1, 34-46-4-2; Ky. Rev. Stat. Ann. § 421.100; La. Rev. Stat. Ann. §§ 45:1451-1459; Md. Code. Ann., Cts. & Jud. Proc. § 9-112; Mich. Comp. Laws Ann.§§ 767.5a, 767A.6; Minn. Stat. Ann. §§ 595.021-.025; Mont. Code Ann. §§ 26-1-902, 26-1-903; Neb. Rev. Stat. §§ 20-144 to 20-147; Nev. Rev. Stat. Ann. 49.275, 49.385; N.J. Stat. Ann. §§ 2A:84A-21.1 to 21.5; N.M. Stat. Ann. § 38-6-7; N.Y. Civ. Rights Law § 79-h; N.C. Gen. Stat. § 8-53.11; N.D. Cent. Code § 31-01-06.2; Ohio Rev. Code Ann. §§ 2739.04, 2739.12; Okla. Stat. Ann. tit. 12, § 2506; Or. Rev. Stat. §§ 44.510-.540; 42 Pa. Cons. Stat. Ann. § 5942(a); R.I. Gen. Laws §§ 9-19.1-1 to 9-19.1-3; S.C. Code Ann. § 19-11-100; Tenn. Code Ann. § 24-1-208.

[22] *See generally New York Times* v. *Gonzales*, 2005 WL 427911, *41 n.37 & n.38 (collecting cases). *See Connecticut State Board of Labor Relations* v. *Fagin*, 370 A.2d 1095 (Conn. Super. Ct. 1976) (civil); *De Roburt* v. *Gannett Co.*, 507 F. Supp. 880 (D. Haw. 1981) (civil); *Idaho* v. *Salsbury*, 924 P.2d 208 (Idaho 1996) (criminal); *In re Wright*, 700 P.2d 40 (Idaho 1985) (criminal); *Winegard* v. *Oxberger*, 258 N.W.2d 847 (Iowa 1977) (civil), *cert. denied*, 436 U.S. 905 (1978); *In re Pennington*, 581 P.2d 812 (Kan. 1978) (criminal), *cert. denied*, 440 U.S. 929 (1979); *In re Letellier*, 578 A.2d 722 (Me. 1990) (grand jury); *In re John Doe Grand Jury Investigation*, 574 N.E.2d 373 (Mass. 1991) (grand jury); *Sinnott* v. *Boston Retirement Board*, 524 N.E.2d 100 (Mass.) (civil), *cert. denied*, 488 U.S. 980 (1988); *Ayash* v. *Dana-Farber Cancer Institute*, 822 N.E.2d 667 (Mass. 2005) (civil); *Missouri ex rel. Classic III, Inc.*, 954 S.W.2d 650 (Mo. Ct. App. 1997) (civil); *New Hampshire* v. *Siel*, 444 A.2d 499 (N.H. 1982) (criminal); *Opinion of the Justices*, 373 A.2d 644 (N.H. 1977) (civil statutory proceeding); *Hopewell* v. *Midcontinent Broadcasting Corp.*, 538 N.W.2d 780 (S.D. 1995) (civil), *cert. denied*, 519 U.S.

tection of confidential sources has now even been recognized in countries around the world that typically afford far less protection to journalists than the United States. *See, e.g., Goodwin* v. *United Kingdom*, [1996] 22 E.H.R.R. 123 (European Ct. of Human Rights) (holding that Article 10 of the European Convention on Human Rights provides protection against the disclosure of confidential sources, and stating that "[p]rotection of journalistic sources is one of the basic conditions for press freedom"); *Roeman and Schmit* v. *Luxembourg*, Applic. No. 51772/99 (European Ct. of Human Rights 2003) (same); *R.* v. *National Post*, [2004] 236 D.L.R. (4th) 551 (quashing order to compel reporter to disclose his confidential sources in connection with criminal investigation because the "eroding of the

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817 (1996); *Dallas Morning News Co.* v. *Garcia*, 822 S.W.2d 675 (Tex. App. 1991) (civil); *Vermont* v. *St. Peter*, 315 A.2d 254 (Vt. 1974) (criminal); *Brown* v. *Virginia*, 204 S.E.2d 429 (Va.) (criminal), *cert. denied*, 419 U.S. 966 (1974); *Clemente* v. *Clemente*, 56 Va. Cir. 530 (2001) (civil); *Philip Morris Co.* v. *ABC, Inc.*, 36 Va. Cir. 1 (1995) (civil); *Clampitt* v. *Thurston County*, 658 P.2d 641 (Wash. 1983) (civil); *Senear* v. *Daily Journal-American*, 641 P.2d 1180 (Wash. 1982) (civil); *Washington* v. *Rinaldo*, 673 P.2d 614 (Wash. Ct. App. 1983) (criminal), *aff'd on other grounds*, 689 P.2d 392 (Wash. 1984); *West Virginia ex rel. Charleston Mail Ass'n* v. *Ranson*, 488 S.E.2d 5 (W. Va. 1997) (criminal); *West Virginia ex rel. Hudok* v. *Henry*, 389 S.E.2d 188 (W. Va. 1989) (civil); *Kurzynski* v. *Spaeth*, 538 N.W.2d 554 (Wis. Ct. App. 1995) (civil); *Zelenka* v. *Wisconsin*, 266 N.W.2d 279 (Wis. 1978) (criminal); *Wisconsin* v. *Knops*, 183 N.W.2d 93 (Wis. 1971) (grand jury). In Mississippi, a trial court has concluded that the state constitution provides a basis for a qualified reporter's privilege. *Hawkins* v. *Williams*, No. 29,054 (Miss. Cir. Ct. Hinds Co. Mar. 16, 1983) (unpublished opinion). In both Mississippi and Utah, trial courts have applied the reporter's privilege in both civil and criminal contexts. *See Pope* v. *Village Apartments, Ltd.*, No. 92-71-436 CV (Miss. 1st Cir. Ct. Jan. 23, 1995) (unpublished opinion) (Gibbs, J.) (civil); *Mississippi* v. *Hand*, No. CR89-49-C(T-2) (Miss. 2d Cir. Ct. July 31, 1990) (unpublished opinion) (criminal); *In re Grand Jury Subpoena*, No. 38664 (Miss. 1st Cir. Ct. Oct. 4, 1989) (unpublished opinion) (grand jury); *Lester* v. *Draper*, No. 000906048 (Utah 3d Dist. Ct. Jan. 16, 2002) (Frederick, J.) (unpublished opinion) (civil case); *Utah* v. *Koolmo*, No. 981905396 (Utah 3d Dist. Ct. Mar. 29, 1999) (Hilder, J.) (unpublished opinion) (criminal case).

ability of the press to perform its role in society cannot be outweighed by the Crown's investigation" and compelling a reporter to "break a promise of confidentiality would do serious harm to the constitutionally entrenched right of the media to gather and disseminate information").[23]

The national consensus[24] in favor of a journalist's privilege was simply ignored by the panel majority below. So too was this Court's admonition in *Jaffee* that courts must consider whether "[d]enial of the federal privilege . . . would frustrate the purposes of the state legislation" by exposing confidences protected under state law to discovery in federal courts. 518 U.S. at 13. The situation in the District of Columbia is illustrative. If Ms. Miller had been subpoenaed by a District of Columbia prosecutor, the information requested would be absolutely privi-

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[23] *See also European Pacific Banking Corp.* v. *Television New Zealand Ltd.*, [1994] 3 N.Z.L.R. 43 (Ct. App. Wellington) (New Zealand) (establishing general rule protecting confidential sources in all cases, both in discovery and at trial); *Oyegbemi* v. *Attorney-General of the Federation & Ors*, [1982] F.N.L.R. 192 (Fed. of Nigeria LR) (Nigeria); *Prosecutor* v. *Radoslav Brdjanin and Momir Talic*, Case No. IT-99-36-AR 73.9 (International Criminal Tribunal for former Yugoslavia 2002) (establishing qualified privilege for war correspondents even when no confidential sources are involved); Freedom of Press Act, Chapter 3, Article 1 (Sweden); Code of Criminal Procedure, Article 109(2) (France); Media Act of 1981, Article 31 (Austria); Criminal Procedure Code, Section 53 (Germany).

[24] Indeed, the near-unanimous consensus of the States on this point is far more impressive than the consensus among the states that led this Court to find that it was no longer consistent with the Eighth Amendment to permit imposition of the death penalty in cases involving the mentally retarded and those who committed capital offenses when under the age of eighteen. *See Atkins* v. *Virginia*, 536 U.S. 304, 313-15 (2002) (finding a sufficient consensus where 30 states prohibited imposition of the death penalty for the mentally retarded); *Roper* v. *Simmons*, 125 S. Ct. 1183,1192 (2005) (finding a sufficient consensus where 30 states prohibited imposition of the death penalty for those under 18).

leged;[25] down the street in federal court she now has no protection at all.

As all of this reflects, the opinion below cannot be reconciled with *Jaffee* on any level. Indeed, both Judge Sentelle and Judge Henderson simply declined to engage in the analysis mandated by *Jaffee*, concluding instead that only this Court or Congress could appropriately consider whether a reporter's privilege should be recognized. App. 24a-30a; 35a. Not only is that a rejection of *Jaffee*, it is a rejection of Congress' express instruction embodied in Rule 501 that it is the duty of the federal courts to develop testimonial privileges on the basis of "reason and experience." Quite literally, the panel majority adopted the reasoning of the two dissenting Justices in *Jaffee* in making clear their refusal, in the words of Judge Henderson, to "rid[e] *Jaffee* v. *Redmond* into the testimonial privilege frontier." App. 34a-35a (citation omitted).

The existence of a reporter's privilege under Rule 501 has been explicitly recognized by the Third Circuit in the context of civil and criminal proceedings. *See Riley*, 612 F.2d at 715 (recognizing federal common law privilege for reporters under Rule 501 in civil cases); *Cuthbertson*, 630 F.2d at 146 (criminal cases); *In re Grand Jury Subpoena of Williams*, 963 F.2d at 567 (grand jury proceedings). Federal district courts throughout the nation have also repeatedly recognized a reporter's privilege under federal common law. *See New York Times Co.* v. *Gonzales*, 2005 WL 427911, at *35-*36 (collecting cases). All of those rulings are in direct conflict not only with the decision below, but also with the Ninth Circuit's holding in *In re Grand Jury Proceedings*. *See* 5 F.3d at 402-03 (rejecting Third Circuit precedent).

This Court has yet to consider whether a reporter's privilege should be recognized under Rule 501. This case is an appropriate vehicle to resolve this important question.

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[25] *See* D.C. Code Ann. §§ 16-4702(1), 4703(b).

C. Review Is Warranted To Resolve A Conflict Among The Circuits As To Whether The Due Process Clause Permits A Contemnor To Be Imprisoned On The Basis Of Secret Evidence

For all its internal disagreement on other issues, the court of appeals agreed on a single proposition: based upon an *ex parte* submission of the Special Counsel that neither Ms. Miller nor her counsel was permitted to examine, the government had met whatever burden the First Amendment imposed upon it to justify an order requiring Ms. Miller to reveal her sources. The basis of that conclusion is set forth in eight pages of Judge Tatel's opinion—pages that are simply blank in the version of the opinion made available to Ms. Miller, her counsel and the public. Never before, to our knowledge, has a court of appeals sanctioned the imprisonment of a party on the basis of facts the party was never permitted to see or rebut in a passage of an opinion that neither the party nor the public was permitted to read.

In affirming the district court's orders to incarcerate Ms. Miller based on the *ex parte* submissions that neither she nor her counsel have ever seen, the decision below conflicts directly with decisions of the Second and Ninth Circuits holding that recalcitrant grand jury witnesses charged with civil contempt and facing incarceration are constitutionally entitled to examine the government's evidence against them. *See In re Kitchen*, 706 F.2d 1266, 1272 (2d Cir. 1983) (holding that witness was denied a full and fair opportunity under the Due Process Clause "to confront all of the government's evidence, both documentary and testimonial" before being charged with civil contempt for giving false and evasive grand jury testimony); *United States* v. *Alter*, 482 F.2d 1016, 1024 (9th Cir. 1973) (holding that grand jury witness charged with contempt for refusing to testify must "be allowed to probe all nonfrivolous defenses to contempt charge" because "[t]he constitutional guarantee of due process of law means more than a silhouette of justice; it requires that judicial determinations affecting the freedom of the individual be openly arrived at after full, fair, and

vigorous debate on both sides of all substantial issues.") (citations omitted).

More broadly, the court of appeals' decision cannot be reconciled with the fundamental principle that those facing a loss of liberty have a constitutional right to examine the Government's evidence so that they may adequately defend themselves. In *In re Oliver*, 333 U.S. 257 (1948), for example, this Court held that a grand jury witness jailed for criminal contempt based on apparent inconsistencies between his testimony and the secret testimony of another witness, had been deprived of due process. *Id.* at 273 ("In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison."). Similarly, in *Greene* v. *McElroy*, 360 U.S. 474 (1959), the Court held that a government contractor was entitled under the Due Process Clause to review secret investigative reports used by the government to justify the revocation of his security clearance despite government claims that "security considerations" prohibited their disclosure. The Court concluded that:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

Id. at 496.

In *Abourezk* v. *Reagan*, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986) (Ginsburg, J.), *aff'd by an equally divided court*, 484 U.S. 1 (1987), then Judge Ginsburg noted her "grave concern" with the district court's heavy reliance upon three classified government affidavits in a challenge to the Secretary of State's

refusal to issue non-immigrant visas to certain aliens. Judge Ginsburg cautioned the district court "to make certain that plaintiffs are accorded access to the decisive evidence to the *fullest extent possible*, without jeopardizing legitimately raised national security interests." *Id.* at 1060 (emphasis added).

> It is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts. It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte, in camera* submissions. Exceptions to the main rule are both few and tightly contained.

Id. at 1060-61 (citations omitted).

The factual distinctions between these cases and the instant case identified by Judge Tatel, *see* App. 102a-103a, in no way diminish the force of petitioner's core due process argument that the government may not incarcerate someone on the basis of secret evidence. That is the central principle for which the cited cases stand, and which the court of appeals' decision offends. Moreover, any need to maintain grand jury secrecy can be vindicated fully through the use of protective orders that permit petitioner (or, at a minimum, petitioner's counsel) access to all relevant evidence.[26] Courts have permitted such access even to alleged enemy combatants, acknowledging that the Due Process Clause requires at least as much. *See United States* v. *Moussaoui*, 382 F.3d 453, 475 (4th Cir. 2004) (holding that defendant had a due process right to access to all evidence in government's possession material to his defense); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 452 (D.D.C. 2005) (describing procedures for disclosure of classified information to habeas peti-

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[26] Counsel to Ms. Miller proposed to both the district court and the court of appeals that they were prepared to review all material submitted to the district court without making it available to their client. *See, e.g.*, Appellants' Brief at 51.

tioners' counsel holding security clearances); *see also id.* at 468 (finding military tribunals reviewing enemy combatant determinations violated due process rights of detainees because "[n]o detainee . . . was ever permitted access to any classified information nor was any detainee permitted to have an advocate review and challenge the classified evidence on his behalf"). *See generally* Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962 (2005). American journalists should not be accorded fewer due process rights than alleged enemy combatants.

Because the court of appeals' decision cannot be reconciled with the cited decisions of the Second and Ninth Circuits and settled due process principles articulated by this Court and others, review by this Court is warranted to consider these fundamental questions.

CONCLUSION

The petition for a writ of certiorari should be granted.

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May 9, 2005